UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

HERRON MAINTENANCE COMPANY[1]

Employer

and Case 19-RC-13881

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS,
PACIFIC MARITIME REGION, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[2] in this proceeding,[3] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> Included: All captains and deck hands employed by the Employer on its vessel the *Charlie Wells* at Lakebay (Herron Island), Washington;
>
> Excluded: All guards and supervisors as defined by the Act, and all other employees.

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[1] The name of the Employer appears as corrected at hearing.

[2] The parties filed briefs, which have been considered.

[3] A hearing in this matter was conducted on December 16, 1999. Thereafter, the matter was remanded for additional evidence and further hearing was conducted on January 24, 2000.

The Employer is a non-profit corporation engaged in providing maintenance and other services, including the operation of the ferry *Charlie Wells*, to property owners on Herron Island in Pierce County, Washington. The petition requests a unit of all captains and deck hands employed by the Employer. The Employer contends that the Board lacks jurisdiction, and, further, that its captains are statutory supervisors and managerial employees, and that on-call employees should be excluded from the unit.[4]

The island is about one and a half miles long by about one mile wide, and is occupied by residential structures. All property owners on the island are "members" of the Employer, and pay to it a monthly assessment. A board of trustees has over-all authority. There is a transportation chairman who is in charge of the ferry. There are approximately 373 property owners. About 75 live on the island full-time. About 34 live outside the state of Washington.

The ferry can accommodate 11 or 12 automobiles, and up to 49 passengers. It runs between the island and Lakebay, Washington, a distance of about six tenths of one nautical mile, which takes about 10 minutes to traverse. The first run of the day leaves the island at 6:15 each morning, and runs continue throughout the day at various times until 7:00 p.m. on weekdays, and later on Friday, Saturday, and Sunday. The normal crew compliment is a captain and a deck hand. All users of the ferry pay a fee, although property owners pay a lower rate than do others. Use of the ferry is restricted to property owners, their guests, and government or utility employees on official business. There is a special arrangement for real estate agents.

Jurisdiction. The evidence reveals that the Employer's revenues for its most recent fiscal year, October 1, 1998 through September 30, 1999, amounted to $411,240, including $240,861 in property owner assessments and $100,057 in ferry user fees. At hearing, the parties stipulated that in the past year, the Employer purchased goods and services in the form of insurance coverage in the amount of at least $10,000 from brokers or carriers who are directly engaged in interstate commerce. Further, record evidence establishes that during its most recent fiscal year the Employer expended $26,378 for insurance as described in the foregoing stipulation; $12,822 for ferry fuel from Cenex Harvest States; $7,500 to Vanguard for employee pension fund contributions; $3,480 for utilities from Peninsula Light; and $2,285 for postage and services from the U.S. Postal Service.[5] The Employer provides a number of services to the property owners, and in the most recent fiscal year expended a total of $283,165 for ferry expenses, $95,879 for administrative expenses, $7,054 for parks, $4,523 for roads, and $14,819 for water. The Employer maintains two wells on the island, which provide water to the residences.

The Employer contends that the only relevant jurisdictional standard is that for condominiums and cooperatives. The Employer contends that no other jurisdictional standard is relevant. The jurisdictional standard for condominiums and cooperatives has been established by the Board as gross annual revenues in excess of $500,000. *30 Sutton Place Corp.,* 240 NLRB 752 (1979). The Employer's revenues fall short of this standard. However, where more than one test for assertion of jurisdiction may apply to an employer, the Board considers all such tests to be equally relevant, and will assert jurisdiction in accordance with any such tests met by the employer. *Margate Bridge Company*, 247 NLRB 1437

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[4] In addition to captains and deck hands, the Employer employs a seasonal park maintenance employee and a water system maintenance employee. The unit placement of these two employees was not addressed in the record, but it is clear that neither party would include them in the unit. Further, they have separate supervision, different skills and duties than the unit employees, and do not interchange with them. Therefore, I shall exclude them from the unit.

[5] The total of such expenditures is $52,466.

(1980); *Country Lane Food Store*, 142 NLRB 683 (1963). Here, while the Employer could be classified as a condominium/cooperative, as urged by the Employer, it could also be classified as a transit company, inasmuch as it provides transportation services to individuals.[6]

The ferry transports passengers and vehicles to and from the island on a regular basis. In *Charleston Transit Company*, 123 NLRB 1296 (1959), the Board determined that it would assert jurisdiction over all transit systems which do a gross volume of business of at least $250,000 per year.[7] *Margate Bridge*, supra, involved a privately owned toll bridge. In that case, the Board found the bridge to be, among other things, a transit system analogous to the bus system in the *Charleston* case and the airline in *Air California*, even though the bridge was stationary. Clearly, the ferry herein is likewise analogous to the bus system and the airline.

The Employer argues that the standard for transit systems does not apply to the Employer, because the Employer provides several non-transportation services to its members, including beaches and parks. However, the ferry is not merely incidental to the Employer's other operations, but is the most substantial part of the Employer's services, requiring about 69 percent of the Employer's total income to support its operations, although ferry user fees represent only about 24 percent of the Employer's total revenues. Clearly, the ferry is "subsidized" by the Employer's other income. In this regard it is reasonable to assume that a proportion of the property owners' monthly assessment is attributable to the ferry and it is appropriate to consider that income in determining whether the Employer meets the standard. The "subsidy" of the ferry amounts to 76 percent of the total assessments, a fact which further supports a conclusion that the ferry is the primary service which the Employer provides. Inasmuch as the Employer derives revenues in excess of $250,000 from ferry income and other income attributable to the ferry operations, I conclude that the Employer meets the standard for a transit system, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

Supervisory Issue. The Employer contends that all its captains are statutory supervisors, including the regular captain, Patrick Steehler; the captain/deck hand John Farris during those times when he is serving as captain; and the three on-call captains, Don Ladd, Mark Siems, and Steve Wiggins, when they are serving as captain.

The normal crew complement on the ferry is a captain and a deck hand. The captain is required to hold a Coast Guard 100-ton inland master's license. The captain is responsible for the over-all day-to-day operation of the ferry, including overseeing the deck hand, scheduled maintenance, fueling, and emergency repairs. The captain is also responsible for verifying repairs made in dry dock and can approve such repairs on his own if the circumstances are such that seeking approval from the board of trustees would delay getting the ferry back into service. An example would be the discovery of a pitted shaft needing replacement before other work could continue. The captain has authority to take the ferry out of service if a repair is needed. For example, the evening prior to the hearing the captain shut down the ferry for several hours while repairs were made to the winch motor which moves the dock up and

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[6] Petitioner urges that the Employer could also be classified as an essential link of interstate commerce. The Board's jurisdictional standard for essential links of interstate commerce is at least $50,000 gross annual income derived from such operations. *HPO Service*, 122 NLRB 394 (1959). It is clear from the Board's discussion in *Margate Bridge*, supra, about the application of this standard in that case that evidence must be sufficient to establish at least $50,000 income from interstate activities. Here, application of the standard would require a showing that fully half of the income derived from ferry users is derived from or related to interstate trips. While relevant record evidence is by no means comprehensive, it appears highly unlikely that additional evidence would warrant a finding that the Employer meets the standard for an essential link of interstate commerce.

[7] See also, *Air California*, 170 NLRB 18 (1968).

down allowing the dock to adjust to tides. The captain can authorize overtime, in that he can continue to operate the ferry after the end of the normal schedule if there are people waiting to cross, or if he gets a call during the night from a property owner requesting a special run, or a call for an emergency run to accommodate fire, police, or ambulance services. It is the policy of the Employer not to leave people stranded overnight, and otherwise to provide special and emergency runs when requested. The captain can allow the deck hand to leave work early, but there are no specific examples in the record of a captain having done so. The captain can waive user fares, and had done so the night before the hearing to placate passengers who had to wait several hours while the winch motor was being fixed. A captain has waived fares only three or four times in the past seven or eight years.

The captains report to the transportation chairman, currently John Nicholas Huff. Authority to hire and fire rests with the board of trustees. The transportation chairman interviews candidates for hire. The transportation chairman schedules the ferry employees. A captain can relieve a deck hand on the spot, although there is no evidence of a captain ever having done so. Huff testified that if a captain recommended that a deck hand be fired, the board of trustees would probably conduct its own investigation, depending on how conclusive the captain's evidence was. Huff recalled that a captain recommended firing a deck hand in 1992. He could not recall the name of anyone who had been fired in the last ten years.

Captains are paid about $15.00 per hour; deck hands are paid about $10.00 per hour. The full-time captain and deck hand get medical insurance and a pension benefit. The captain's day-to-day duties include performing a regular check of the ferry before commencing operations, overseeing loading vehicles, and steering the vessel. The deck hand cleans up the bilge and performs general housekeeping on the boat. Occasionally, when the captain is otherwise engaged, the deck hand oversees loading vehicles.

Section 2(11) of the Act defines a "supervisor" as:

> . . .[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Board has considered the supervisory status of maritime captains in numerous cases. In *A. & S. Transportation,* 116 NLRB 1025 (1956), a barge captain who was in full charge of the vessel and crew and had authority to hire, discharge, direct, and discipline employees was found to be a supervisor. In *Mardril, Inc.,* 119 NLRB 1174 (1957), barge masters and captains who had authority to responsibly direct their respective crews when the vessels were at sea were found to be supervisors. In *Mon River Towing*, 173 NLRB 1452 (1969), boat captains were found to be supervisors where they had authority to discharge employees while the boats were underway; they made watch and work assignments and could require overtime; they evaluated the employees' ability and experience; and they could grant or deny employees' requests for permission to leave the boats while underway. In *A.L. Mechling Barge Lines*, 197 NLRB 592 (1972), captains were found to be supervisors where they responsibly directed employees, and effectively recommended promotions, demotions, transfers, and discharges. In *Universal Towing Company*, 198 NLRB 1124 (1972), captains were found to be supervisors where they had authority to direct the work of employees, to adjust their grievances, and to effectively recommend disciplinary action. More recently, in *McAllister Bros.,* 278 NLRB 601 (1986), vessel captains who did not possess any indicia of statutory supervisory authority were found not to be supervisors. In *Spentonbush/Red Star Companies*, 319 NLRB 988 (1995), the Board found that tugboat and barge captains were not statutory supervisors, a finding

overturned by the Second Circuit (at 106 F.3d 484, 1997). In so ruling, the court found, contrary to the Board, that the captains exercised authority to responsibly direct their crews. The court also discussed traditional powers given to ship captains,[8] saying that "ships' masters occupy positions that are markedly different from those of shore-based lead men or foremen, and the relationship of master and crewman is entirely different from that of employer and employee on land." The court nevertheless drew a different conclusion than the Board from the evidence. That is, the court found that the captains possessed at least one of the indicia of supervisory status, as enumerated in Section 2(11) of the Act.

In several of the foregoing cases, vessel captains were found to be supervisors on the basis of evidence that they possessed one or more of the statutory indicia of supervisors. In contrast, here there is no such evidence. Captains are not involved in hiring employees. Captains' recommendations for discipline or termination are reviewed by the board of trustees, which makes its own decision based either on the facts as presented by the captain or upon its own further investigation. The transportation chairman schedules the captains and deck hands. There is no evidence that the deck hand's duties require any direction at all from the captain. In requiring a deck hand to work overtime to make a non-scheduled run, the captain is simply following established Employer policy and no discretionary judgment is involved. The testimony that a captain can permit a deck hand to leave work early and that a captain can relieve a deck hand on the spot is unsupported by any specific evidence and, without more, is insufficient to establish that any independent judgment is required. The captain's authority with respect to other matters, such as maintenance and repair of the vessel, waiving of user fees, and delaying the operation of the ferry while repairs are carried out do not establish supervisory authority. Moreover, a finding here that the captains are supervisory would result in a supervisor to employee ratio of one-to-one.

I conclude that the captains herein are distinguishable from those found supervisory by the Board in other cases, inasmuch as the captains here do not possess any of the statutory indicia of supervisory status. I am mindful of the Second Circuit's admonition that vessel captains are "quite different" from crew chiefs in land-based activities, but the maritime powers of the traditional sea captain become almost immaterial when applied to a vessel which plies a ten-minute run of about 1200 yards dock to dock. While the captains herein may differ from land-based leadmen, foremen, or crew chiefs in that they have the responsibility for the safety of the lives of their passengers and crew, such responsibility does not elevate them to statutory supervisory status, in the absence of any of the indicia of such status. The Board has held that neither licensed status, in which an individual is responsible for the safety of others, or responsibility for physical property alone, confers supervisory status. *Graham Transportation Company*, 124 NLRB 960 (1959); *Pantex Towing Corporation*, 258 NLRB 837 (1981); *McAllister Bros.,* supra.

I conclude, therefore, that captains are not statutory supervisors.

Managerial employee issue. The Employer further contends that its captains are managerial employees. The Board defines managerial employees as "executives who formulate and effectuate management policies by expressing and making operative the decisions of their employer." *Palace Laundry Dry Cleaning*, 75 NLRB 320 (1947); *NLRB v Bell Aerospace Co*., 416 U.S. 267 (1974). There is no evidence here that the captains are involved in any way in formulating Employer policy. Indeed, it is clear that all Employer policy emanates from the board of trustees, and that the captains simply conduct themselves in accordance with such policy. I conclude, therefore, that the captains are not managerial employees.

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[8] Indeed, the court cited *Southern Steamship Co.,* 316 U.S. 31 (1942): "Ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land. The lives of passengers and crew, as well as the safety of ship and cargo, are entrusted to the master's care. Every one and every thing depend on him. He must command and the crew must obey."

On-call employees. The Employer regularly employs one full time captain, one full time deckhand, one part-time captain, and one part-time deckhand. In addition, it maintains a list of on-call employees, both captains and deck hands, who work on those occasions when a regular employee is not available. At the time of the remanded hearing, John Farris was the full time captain, Donnie Surratt was the fulltime deckhand, Steve Wiggins was the part-time captain, Tim Jones was the part-time deckhand, and Patrick Steehler, who otherwise would have been the fulltime captain, was off on disability.

In addition to the foregoing employees, the record establishes the following work history for employees classified as "on-call" at the time of the remanded hearing:

Name	June	July	Aug	Sept	Oct	Nov	Dec
Don Ladd (captain)	0	0	0	0	29	89.25	
Mark Siems (captain)	0	0	0	0	51	38	0
David Clauson (deckhand)	25.75	8.5	2	0	0	12.5	0
Megan Evans (deckhand)	9.75	0	0	9.5	21.5	20.75	0

All months are 1999. Amounts shown are hours per month.

The Employer contends that the on-call employees lack a community of interest with the regular employees, and should therefore be excluded from the unit. Petitioner seeks their inclusion. In *Saratoga County Chapter NYSARC*, 314 NLRB 609 (1994), the Board said:

> In determining whether on-call employees who perform work should be included in the bargaining unit, the Board considers the regularity of their employment. Employees are considered to have been regularly employed when they have worked a substantial number of hours within the period of employment prior to the eligibility date. Under the Board's longstanding and most widely used test for voter eligibility in these circumstances, an on-call employee is found to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee regularly averages 4 or more hours of work per week for the last quarter prior to the eligibility date. *Davison-Paxon Co.,* 185 NLRB 21 (1970). Although no single eligibility formula must be used in all cases, the *Davison-Paxon* formula is the one most frequently used, absent a showing of special circumstances. [Footnote omitted.]

No special circumstances have been shown here. Further, no party herein has urged any eligibility formula different from that set forth in *Davison-Paxon*. The record establishes that on-call employees herein perform the same work as regular employees under the same supervision, and receive the same rates of pay, although they are not eligible for any fringe benefits. Further, the work history of the on-call employees as a group demonstrates a pattern of repeat employment.

On the basis of the foregoing, I conclude that on-call employees herein share a sufficient community of interest to warrant their inclusion in the unit, and that their eligibility to vote in the election shall be in accordance with application of the *Davison-Paxon* formula, as described in the Direction of Election below.

There are approximately 9 employees in the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently,

subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off, and on-call employees averaging four or more hours per week during the three-month period preceding said payroll period.[9] Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, PACIFIC MARITIME REGION, AFL-CIO.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 4 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Seattle Regional Office, 2948 Jackson Federal Building, 915 Second Avenue, Seattle, Washington, on or before February 17, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive

[9] In accordance with the Board's practice of putting eligibility periods relatively close to the election.

Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by February 24, 2000.

DATED at Seattle, Washington, this 10th day of February, 2000.

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Raymond D. Willms, Acting Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

260-6744
260-6732
260-6704
260-6792
177-8580-4400
460-5033-7501
460-5067-8200